**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

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| LINEAR TECHNOLOGY CORPORATION, | ) | |
| | ) | |
| Plaintiff, | ) | C.A. No. 06-476 (GMS) |
| | ) | |
| v. | ) | **JURY TRIAL DEMANDED** |
| | ) | |
| MONOLITHIC POWER SYSTEMS, INC., | ) | **PUBLIC VERSION** |
| | ) | |
| Defendant. | ) | |

**MONOLITHIC POWER SYSTEMS' REPLY TO MOTION IN LIMINE NO. 4 TO PRECLUDE EVIDENCE OF USE OF THE MP1543 BY CUSTOMERS**

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## I. INTRODUCTION

Linear's opposition first concentrates on MPS's alleged direct infringement, an issue that is irrelevant to indirect infringement. MPS's direct infringement, if any, is also irrelevant to Linear's breach of contract claim, which is only applicable to "**sales**" of a covered product. Thus, Linear's discussion of MPS's alleged direct infringement – whether by testing, internal use, or otherwise – has no bearing on MPS's motion.

The Court should grant MPS's motion because Linear cannot show direct infringement by the two U.S. entities that purchased MP1543 parts from MPS's distributor. Linear states that it should be allowed to argue to the jury that circumstantial evidence implies such direct infringement. There is, however, no evidence that either of those entities received a data sheet or made so much as a single voltage regulator with an MP1543 part. Linear should not be permitted to ask the jury to infer the details of products that do not exist. The Court should exercise its power, under Federal Rule of Civil Procedure 16, to "weed out unmeritorious claims . . . before trial begins." *Smith v. Gulf Oil Co.*, 995 F.2d 638, 642 (6th Cir. 1993).

## II. ALLEGED DIRECT INFRINGEMENT BY MPS IS IRRELEVANT TO INDIRECT INFRINGEMENT

In its opposition, Linear accuses MPS of having committed direct infringement by building infringing combinations to test the MP1543. This is irrelevant to this motion. While MPS disagrees that its testing of parts could constitute infringement, MPS's motion does not seek to preclude Linear from making that argument. Rather, MPS seeks to preclude Linear from arguing that some MPS customer has used the MP1543 in a manner that directly infringes. "[L]iability for either active inducement of infringement or for contributory infringement is ***dependent upon the existence of direct infringement by customers***." *RF Delaware, Inc. v. Pacific Keyston Techs., Inc.*, 326 F.3d 1255, 1268 (Fed. Cir. 2003) (emphasis added).

Linear's statement that "infringement by others need not be shown because Monolithic itself directly infringes" is misplaced. MPS's motion targets Linear's accusations of indirect infringement – *i.e.*, inducing infringement and contributory infringement. MPS's alleged direct infringement is irrelevant to that inquiry.[1]

## III. LINEAR HAS INTRODUCED NO CIRCUMSTANTIAL EVIDENCE OF DIRECT INFRINGEMENT BY MPS'S CUSTOMERS

"[T]he patentee always has the burden to show direct infringement for each instance of indirect infringement." *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1303 (Fed. Cir. 2006). The parties agree that Linear cannot show any direct evidence of indirect infringement. To overcome this problem, Linear argues that it should be permitted to show indirect infringement through circumstantial evidence. *See Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings,* 370 F.3d 1354, 1364-65 (Fed. Cir. 2004). Specifically, Linear intends to rely on the datasheet for the MP1543. There is no evidence, however, that either of the two U.S. entities that purchased the MP1543 ever received a datasheet. Moreover, there is no evidence that any of the miniscule number of MP1543 parts sold in the United States (110) ever ended up in a voltage regulator.

The Federal Circuit has held that to show indirect infringement, the patentee at least must show that a third party made or sold a product that included the accused component. *DSU Med. Corp.*, 471 F.3d at 1303 ("[T]o prevail on contributory infringement, DSU must have shown that ITL made and sold the Platypus . . . ."); *S. Bravo Sys., Inc. v. Containment Techs. Corp.*, 96 F.3d

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[1] MPS's alleged direct infringement is also irrelevant to the question of whether MPS breached the Settlement and License Agreement ("SA"), assuming that the Court were to deny MPS's pending Motion for Summary Judgment of No Breach of Contract (Count One). The SA does not cover direct infringement by MPS. Rather, it provides that "MPS agrees that it has not made and will not make ***any sales*** of any other products" covered by the SA. SA, § 3.3 (emphasis added). Thus, even if Linear's "'ZX circuitry' means any infringing circuitry" argument were viable, Linear still would have to demonstrate that MPS ***sold*** an MP1543 to someone in the United States who then used it to build an infringing product.

1372, 1376 (Fed. Cir. 1996) ("Bravo's ***failure to proffer any evidence of direct infringement likewise doomed its claims*** of contributory infringement and inducement to infringe") (emphasis added). Linear has admitted that it has no such evidence. *See* Flatness, 8/14/2007 Dep. Tr. at 105:7-10 (Ex. 3 to Motion). A jury would be unreasonable to conclude otherwise.

Linear's opposition cites to cases holding that circumstantial evidence may be used to prove indirect infringement. The cases, however, do not assist Linear. For example, in *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 1 Fed. Appx. 879, 884 (Fed. Cir. 2001) (unpublished), the passage cited by Linear was addressing damages issues, not infringement. In any event, *Chiuminatta* involved the sale of a finished product, not a part that itself was incapable of infringement. Even then, the Federal Circuit reversed the district court's finding that "each sale of a Green Machine saw led to an act of infringement." Similarly, *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986) dealt with sales of a finished puzzle together with an "an instruction sheet teaching the method of restoring the preselected pattern." *Pickholtz v. Rainbow Techs., Inc.*, 260 F. Supp. 2d 980, 988 (D. Cal. 2003), a district court opinion, is inapplicable – it focuses on the requisite mental state necessary to support an indirect infringement finding.[2] None of Linear's cases relieves a patentee from proving direct infringement by someone as a prerequisite to claiming indirect infringement.

## IV. CONCLUSION

For the reasons set forth above, the Court should grant MPS's motion and preclude Linear from making an indirect infringement argument.

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[2] Linear's reliance on *VLT Corp. v. Unitrode Corp.*, 130 F. Supp. 2d 178, 184 (D. Mass 2001), is similarly off point, as "Unitrode [did] not argue that Vicor lacks the evidence necessary to prove direct infringement by any third party device." Similarly, in *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1326-27 (Fed. Cir. 2004), it was undisputed that a third party manufactured and sold a product that incorporated the defendant's product.

Respectfully submitted,

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Dated: May 2, 2008
Public Version Dated: May 9, 2008
863729 / 30611

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**CERTIFICATE OF SERVICE**

I, David E. Moore, hereby certify that on May 9, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

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